

SI
530

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name STRONG SYLVESTER
(Last) (First) (Initial)

FILED

Prisoner Number D-99287

Institutional Address Correctional Training Facility

P.O. Box 689, Soledad, CA 92960

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

SYLVESTER STRONG,
(Enter the full name of plaintiff in this action.)

VS.

ARNOLD SCHWARZENEGGER, Governor,
State of California; BEN CURRY,
Warden.

(Enter the full name of respondent(s) or jailor in this action)

Case No. _____
(To be provided by the clerk of court)

**PETITION FOR A WRIT
OF HABEAS CORPUS**

SI
(PR)

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainees), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

- (a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

Fresno County Superior Court, Fresno

Court

Location

- (b) Case number, if known **380750-0**

- (c) Date and terms of sentence **10/21/1988, 15-years to life**

- (d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes **xx** No _____

Where?

Name of Institution: **Correctional Training Facility**

Address: **P.O. Box 689, Soledad, CA 93960**

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

Second degree murder, Penal Code § 187

3. Did you have any of the following?

Arraignment: Yes _____ No _____

Preliminary Hearing: Yes _____ No _____

Motion to Suppress: Yes _____ No _____

4. How did you plead?

Guilty _____ Not Guilty _____ Nolo Contendere _____

Any other plea (specify) _____

5. If you went to trial, what kind of trial did you have?

Jury _____ Judge alone _____ Judge alone on a transcript _____

6. Did you testify at your trial? Yes _____ No _____

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes _____ No _____

(b) Preliminary hearing Yes _____ No _____

(c) Time of plea Yes _____ No _____

(d) Trial Yes _____ No _____

(e) Sentencing Yes _____ No _____

(f) Appeal Yes _____ No _____

(g) Other post-conviction proceeding Yes _____ No _____

8. Did you appeal your conviction? Yes _____ No _____

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes _____ No _____

Year: _____ Result: _____

Supreme Court of California Yes _____ No _____

Year: _____ Result: _____

Any other court Yes _____ No _____

Year: _____ Result: _____

(b) If you appealed, were the grounds the same as those that you are raising in this

petition? Yes _____ No _____

(c) Was there an opinion? Yes _____ No _____

(d) Did you seek permission to file a late appeal under Rule 31(a)?

Yes _____ No _____

If you did, give the name of the court and the result:

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes XX No _____

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: Fresno County Superior Court

Type of Proceeding: Habeas Corpus

Grounds raised (Be brief but specific):

a. SAME AS RAISED HEREIN

b. _____

c. _____

d. _____

Result: Denied (EXHIBIT 1) Date of Result: 12/22/06

II. Name of Court: App.Ct. of Calif., Fifth App. Dist.

Type of Proceeding: Habesa Corpus

Grounds raised (Be brief but specific):

1 a. SAME AS RAISED HEREIN

2 b. _____

3 c. _____

4 d. _____

5 Result: Denied Date of Result: 5/24/07

6 III. Name of Court: California Supreme Court

7 Type of Proceeding: Petition for Review

8 Grounds raised (Be brief but specific):

9 a. SAME AS RAISED HEREIN

10 b. _____

11 c. _____

12 d. _____

13 Result: Denied Date of Result: 8/8/07

14 IV. Name of Court: _____

15 Type of Proceeding: _____

16 Grounds raised (Be brief but specific):

17 a. _____

18 b. _____

19 c. _____

20 d. _____

21 Result: _____ Date of Result: _____

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

23 Yes XX No _____

24 Name and location of court: Fed.Ct., Eastern Dist. Challenging
25 plea agreement, Case no. CV 00112 OWW TAG HC

26 B. GROUNDS FOR RELIEF

27 State briefly every reason that you believe you are being confined unlawfully. Give facts to
28 support each claim. For example, what legal right or privilege were you denied? What happened?

Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

B. GROUNDS FOR RELIEF

Claim I

IT WAS A VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE GOVERNOR OF CALIFORNIA REVERSED THE BOARD OF PAROLE HEARINGS GRANT OF PAROLE WHEN THE GOVERNOR RELIED SOLELY ON IMMUTABLE FACTORS THAT HAVE NO PREDICTIVE VALUE OF PETITIONER'S CURRENT THREAT TO PUBLIC SAFETY.

Supporting facts

On April 1, 1988 the District Attorney of Fresno County filed a five count information in the Superior Court of California, County of Fresno (EXHIBIT 2). In a plea agreement, three of the counts were dismissed. It was agreed that the dismissed counts would not be used in sentencing considerations (People v. Harvey (1979) 25 Cal.3d 754, 758; see EXHIBIT 3, p. 5).

In the information filed in the Fresno County Superior Court on April 1, 1988 (EXHIBIT 2), relevant to case at bench, in count one, Petitioner was charged with a "violation of section 187 of the penal code,^{1/} a felony. The said defendant, on or about Decemeber 10, 1987, did willfully, unlawfully, and with malice aforethought murder Diane Strong, a human being" (EX. 2, p. 1); and in count two, Petitioner was charged with a "violation of section 245(a)(1) of the penal code...on or about December 10, 1987, did willfully and unlawfully commit an assault upon Lavelle Jones, with a deadly weapon, to wit: a knife, and by means of force to produce great bodily injury" (EX. 2, p. 2).

On September 12, 1988, Petitioner entered a "no contest" plea

1. All statutes and regulations are California, unless otherwise noted.

to both counts (EXHIBIT 4, Change of Plea" at RT 20:13-16, 21:16-23; 22:3-11).

Petitioner has been continually imprisoned since the date of the instant offense, December 10, 1987. As of the date of Petitioner's parole suitability hearing when he was found suitable for parole, May 31, 2006, Petitioner had been imprisoned 19 years 3 months. With conduct credits (Penal Code § 190 [1987 ed.]; California Code of Regulations, Title 15 (hereafter Cal. Code Regs., tit. 15), § 2410), applying only to the indeterminate term, commencing November 2, 1988, Petitioner has served the equivalent of 24 years. Petitioner's release date was fixed, pursuant to Cal. Code Regs., tit. 15, § 2403(II-C) [18-19-20 years]) (EXHIBIT 5, HT[06] 105:26), the term being fixed at 19 years, plus 6 months for use of a weapon. When conduct credits are applied to the uniform term matrix, Petitioner's release date should have been approximately May of 2001. It is the May 31, 2006 parole suitability hearing that the governor's decision flows from.

At the instant parole suitability hearing, Petitioner was sworn to tell the truth (HT 16:16-20). The facts of the controlling offense were taken from the POR at pages 2-5 (EXHIBIT 6), incorporated into the record (HT 16:22-17:5), then Petitioner filled in the gaps. It is these facts from which the governor derived his facts for his decision (EXHIBIT 7). The facts being as follows by the governor:²

² The facts as presented in the POR and governor's decision are a "Readers Digest" version and do not provide a complete picture, thus as EXHIBIT 8 Petitioner provides relevant pages from the Clerk's Transcript on Appeal, which he will refer to in his Traverse to rebut the respondent's Answer. The preliminary testimony may not be germane to Petitioner's current threat to public safety, but it is certainly germane to the truth.

Lavelle Jones was at the home of Diane Strong when Petitioner arrived at Mrs. Strong's front door. Petitioner told Mrs. Strong to open the door. Mrs. Strong would not open the door because she had a restraining order against Petitioner. "[Petitioner] then broke open the door and stumbled inside. Lavelle testified that [Petitioner] was holding a knife. [Petitioner] accused Lavelle of going with Diana, and he started calling Diana names and said, 'Bitch, I am going to kill you.' Diana tried to run but [Petitioner] grabbed her and started hitting her. He was still holding the knife. Diana screamed, 'Sylvester, don't hurt me.' Lavelle began to leave and said, 'Sylvester, don't you all hurt each other.' Diana ran into Lavelle as she tried to leave through the front door. She lost her balance and fell to her knees by the entryway. [Petitioner] approached Lavelle, cut his hand with the knife and said he was going to kill him too. Lavelle ran out of the house."

It was Petitioner who called 911 for medical assistance, admitting he stabbed his wife (EX. 6, p. 2).

Relevant to the statement that Petitioner came through the door with a knife in his hand, "According to another officer's testimony, set forth in the probation report...[i]n the kitchen, he saw a butcher block knife holder with a knife missing..." (EX. 6, p. 1).

Mr. Lavelle did indeed testify Petitioner cut him with a knife, but does not know exactly when, but believes it was when Petitioner came at him (EXHIBIT 8, CT 32:11-33:17), and there is no testimony of Petitioner telling Mr. Lavelle that he was going to kill him too (pages related to objections and discussions with the court omitted).

The cause of death was "Hemorrhagic Shock due to Stab Wound to Neck and Chest" cutting "the right internal jugular vein, and cut the Azygous vein" (EXHIBIT 6, p. 4).

On November 3, 1998, Petitioner was found unsuitable for parole at his initial parole suitability hearing (EXHIBIT 9, '98 decision). The primary reason for finding Petitioner unsuitable for parole was the commitment offense: "The offense was carried out in an especially cruel and callous manner which exhibits a callous disregard for life and suffering of another" (EX. 9, '98 decision, p. 1:11-14). It

was also noted that Petitioner's psychological evaluation, prepared by the Board's own forensic experts (see EXHIBIT 10, 1998 psychological evaluation), found Petitioner's "violence potential is estimated to be somewhat below average relative to this inmate population" (EX. 9, '98 decision p. 3:12-15).

On September 24, 2001, Petitioner second parole suitability hearing, he stipulated to a one year deferral (EXHIBIT 11). A psychological evaluation was prepared for the 2001 hearing (EXHIBIT 12, wherein the Board's forensic expert concluded Petitioner's "violence potential if released to the community is therefore estimated to be no higher than the average citizen in the community" (EX. 12, p. 5).

On August 27, 2002, Petitioner was found unsuitable for parole at his third parole suitability hearing (EXHIBIT 13, '02 decision). The primary reason for finding Petitioner unsuitable for parole was again the commitment offense: "The offense was carried out in an especially cruel and callous manner. Multiple victims were attacked and injured. The victim was abused, defiled during the offense. The offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering, and the motive for the crime was inexplicable and trivial in relation to the offense" (EX. 13, '02 decision, p. 1:14-22). It was noted that Petitioner's 2000 psychological evaluation (EXHIBIT 12) was "not totally supportive in that there are areas of concern" then citing immutable factors commented on by the Board's forensic expert (EX. 13, '02 decision, pp. 2:15-3:1). The Board's interpretation of the evaluation was cleared up by its author, Dr. Howlin (EXHIBIT 14).

On October 21, 2003, Petitioner was again found unsuitable for parole at his fourth parole suitability hearing (EXHIBIT 15, '03 decision). The primary reason for finding Petitioner unsuitable for parole was again the commitment offense: "Paramount reasoning would be the timing and gravity of the committing offense, Mr. Strong. The offense was carried out in a vicious and brutal manner" (EX. 15, '03 decision, p. 1:14-17); "The motive for this crime was inexplicable and very trivial. The offense was carried out...in an exceptionally insensitive disregard for human suffering" (EX. 15, p. 2:4-8). In reference to Petitioner's psychological evaluation, which was the 2000 evaluation (EX. 12), the Board stated it to be "adequate" (EX. 15, p. 3:7).

On November 18, 2004, Petitioner was again found unsuitable for parole at his fifth parole suitability hearing (EXHIBIT 16, '04 decision). The primary reason for finding Petitioner unsuitable for parole was again the commitment offense: "This offense was carried out in an especially cruel and callous manner" (EX. 16, '04 decision, p. 1:15-16); "The offense was carried out in a dispassionate -- it was calculated, because you went there" (EX 16, p. 1:20-21); "The motive for this crime was inexplicable" (EX. 16, p. 2:2). A new psychological evaluation was prepared by Dr. Sexton (EXHIBIT 17). Dr. Sexton concluded that Petitioner has "no more violence potential than the average male in the general population of equal age" (EX. 17, p.3). The Board commented, "the most recent psychological evaluation shows that you're making progress" (EX. 16, p. 3:14-17).

Petitioner was found suitable for parole at his sixth parole suitability hearing (EXHIBIT 5, HT[06] 99-114). For this hearing

the Board relied on Petitioner's 2004 psychological evaluation (EXHIBIT 17). A review of the 2006 decision will contrast, after four actual parole hearings, how the reasons given to deny parole are suddenly reversed and are now favorable to suitability.

In reversing the Board's finding of suitability for parole, the governor, after reviewing the facts of the crime set out above, the governor relied on "[t]he gravity of this shocking crime is alone sufficient for me to conclude presently that Sylvester Strong's release from prison would pose an unreasonable public-safety risk. The Fresno County District Attorney's Office expressed to the 2006 Board its opposition to Mr. Strong's parole, based in part on the gravity of the murder he committed" (EXHIBIT 7, p. 3).

* * * * *

If any of these grounds was not previously presented to any other court, state briefly which grounds were not presented and why:
All grounds have been exhausted.

1 List, by name and citation only, any cases that you think are close factually to yours so that they
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning
3 of these cases:

4 SEE MEMORANDUM OF LAW ATTACHED HERETO AS APPENDIX "A"
5 _____
6 _____

7 Do you have an attorney for this petition? Yes _____ No XX

8 If you do, give the name and address of your attorney:
9 _____

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12
13 Executed on 9/12/2007

14 Date

Sylvester Strong

Signature of Petitioner

15
16
17
18
19
20 (Rev. 6/02)

M E M O R A N D U M O F L A WJURISDICTION OF THE COURT

Review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is deferential. The writ may be granted where the state court actions "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" (28 U.S.C. § 2254(d)).

Petitioner has a "liberty interest" in parole (In re Lawrence, 150 Cal.App.4th 1511 (2007), citing inter alia, Greenholtz v. Inmates of Nebraska Penal and Correctional Complex (hereafter Greenholtz), 442 U.S. 1 (1979); Superintendent v. Hill (hereafter Hill), 472 U.S. 445 (1985); Biggs v. Terhune, 334 F.3d 910 (9th Cir. 2003); Sass v. California Board of Prison Terms (hereafter Sass), 461 F.3d 1123 (9th Cir. 2006); Irons v. Carey, 479 F.3d 658 (9th Cir. 2007)).

When a "liberty interest" attaches to a government action depriving one of his or her liberty, the United States Supreme Court has opined that "some evidence" is used "as a standard of review, not as a standard of proof" (Hamdi v. Rumsfeld, 452 U.S. 507, 537 (2004); see In re Morrall, 102 Cal.App.4th 280, 302 (2002); California Evidence Code, § 115; Calif. Code Regs., tit. 15, § 2000(b)(50)). Thus, significant to the primary determination, was the proper "standard of proof" applied? An EVIDENTIARY HEARING is required to determine what "standard of proof" the Board applies in parole suitability determinations.

On judicial review, although the "some evidence" standard may apply, "it is not just 'some evidence' to support the Governor's findings, but 'some evidence' sufficient to satisfy the statute's ultimate test, that is, 'some evidence' the release of Lawrence would subject society to an 'unreasonable risk' of danger to public safety" (In re Lawrence, 150 Cal.App.4th, at 1544, supra). "The test is...whether some evidence indicates a parolee's release unreasonably endangers public safety" (In re Lee, 143 Cal.App.4th 1400, 1408 (2006), emphasis in original, Petition for Review denied, depublication denied). The Executive "must remain focused not on the circumstances that may be aggravating in the abstract but, rather, on facts indicating that release currently poses 'an unreasonable risk of danger to society' (§ 2402, subd. (a); accord, Pen.Code, § 3041, subd. (b))" (In re Elkins, 144 Cal.App.4th 475, 499 (2006), emphasis added, Petition for Review denied, depublication denied). In other words, "whether the inmate will be able to live in society without committing additional antisocial acts" (In re Lawrence, supra, 150 Cal.App.4th, at 1543). Thus, the focus is to be on CURRENT parole risk, not a risk two decades in the past.

A. The Commitment Offense Is No Longer Evidence of Current Threat to Public Safety.

Petitioner had completed his minimum eligible parole date (MEPD) on December 10, 1999 (EXHIBIT 1, HT 2), seven (7) years prior to his 2006 parole suitability hearing. Petitioner had satisfied the 15 year bottom end of his sentence of 15 years to life on November 11, 2003. Thus, the commitment offense being 19 years behind Petitioner, and surpassing his MEPD and minimum term by several years, the commitment offense has lost its predictive value (Greenholtz,

442 U.S., at 10, supra [offense is relative to time, "entailing primarily what a man is and what he may become rather than simply what he has done"]; Moody v. Daggett, 429 U.S. 78, 88-90 (1976) [postconviction record is one of the "most significant" factors of predicting parole suitability]; Irons v. Carey, 479 F.3d, at 665, supra [commitment offense is not reliable after serving minimum term]; Biggs v. Terhune, 334 F.3d, at 916-917, supra [commitment offense initially may be used to deny parole, but may violate due process to use after initial hearing; see also Willis v. Kane, 458 F.Supp.2d 1126, 1130 (N.D. Cal. 2007); Sanchez v. Kane, 444 F.Supp.2d 1049, 1062 (C.D. Cal. 2006); Rosenkrantz v. Marshall, 444 F.Supp.2d 1063, 1084-1086; Martin v. Marshall, 431 F.Supp.2d 1038, 1047 (N.D. Cal. 2006); In re Lawrence, 150 Cal.App.4th, at 1551, 1561; In re Barker, 151 Cal.App.4th 346, 372 (2007); In re Lee, 143 Cal.App.4th, at 1412, supra; In re Elkins, 144 Cal.App.4th, at 498, supra; Brown v. Kane, Slip Copy, 2007 WL 1288488, *4 (N.D. Cal. 5/2/07); Blankenship v. Kane, Slip Copy, 2007 WL 1113798, *11 (N.D. Cal. 4/12/07)).

The Governor determined that Petitioner's offense "was exceptionally callous disregard for [Diana's] suffering and life. In addition, there is evidence in the record before me that Sylvester engaged in some level of premeditation" (EXHIBIT 7, p. 3).

On September 12, 1988, Petitioner pled guilty to one count of second degree murder in violation of Penal Code § 187. This plea was pursuant to Penal Code § 1192.1 [a defendant cannot be punished for a crime greater than the degree he agreed to when entering into his contract with the state.] see also Blakely v. Washington, 542 U.S. 296, 299-300, 303-304 (2004); Santobello v. New York, 404 U.S.

257 (1971); Henderson v. Hogan, 426 U.S. 637 (1976); People v. Jermone, 160 Cal.App.3d 1087 (1984) [Petitioner can only be punished for the elements of the offense as charged and agreed to]; Blaenkenhip v. Kane, Slip Copy, 2007 WL 1113798, *7, supra ["the Governor's characterization of Petitioner's actions as premeditated is incorrect because the trial court found the offense was murder in the second degree"])).

C O N C L U S I O N

Based on the foregoing facts, exhibits and case law, it is respectfully requested that an Order to Show Cause issue for the respondent to show cause why the writ should not be granted and the Governor's decision vacated and the Board's finding of suitability of parole reinstated and Petitioner released on parole within ten (10) days of the Court's Order.

DATED: 9/12/2007

Respectfully submitted,

Sylvester Strong
Sylvester Strong
Petitioner in pro se

September 12, 2007

Sylvester Strong, D-99287
CTF-East Dorm (ED-40L),
P.O. Box 689
Soledad, CA 93960

Petitioner in pro se

Clerk of the Court
United States District Court
Northern District of California
450 Golden Gate Ave.
San Francisco, CA 94102

RE: FILING WRIT OF HABEAS CORPUS

Clerk of the Court:

Please find enclosed my writ of habeas corpus, absent filing fee. Because writs are delayed, sometimes sent without a money order enclosed from the prison trust office, and sometimes writs even lost, I feel it safest to send my writ directly and be billed. Please send to me a notice of filing fee with case number and I will make arrangements for remittance from a family member outside the prison.

Thank you for understanding my situation. I apologize for any inconvenience this may cause, but it does avoid much frustration in dealing with prison workers who just don't care.

Respectfully,

Sylvester Strong
Sylvester Strong
Petitioner in pro se